Supreme Court, U.S.
FILED
OCT 17 1996
CLERK

No. 96-414

In The

Supreme Court of the United States

October Term, 1996

INDEPENDENT CHARITIES OF AMERICA, INC., et al.,

Petitioners,

vs.

STATE OF MINNESOTA, WAYNE SIMONEAU, in his capacity as Minnesota Commissioner of Employee Relations,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

JOHN S. GARRY
Assistant Attorney General

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2128
(612) 282-5712

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

QUESTION PRESENTED

Is a state subject to dormant Commerce Clause scrutiny as a market regulator when it acts as an employer to limit access to its workplace for charitable fundraising in the same way any private employer could?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 8

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE GUIDING PRINCIPLES OF THE MARKET-PARTICIPANT DOCTRINE IDENTIFIED IN THIS COURT'S DECISIONS .. 8

II. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *SMITH V. DEPARTMENT OF AGRICULTURE* OR ANY OTHER DECISION OF ANOTHER COURT OF APPEALS 12

III. A DETERMINATION ON THE PETITION SHOULD NOT BE DELAYED TO AWAIT THIS COURT'S DECISION IN *CAMPS NEWFOUND/ OWATONNA, INC. V. TOWN OF HARRISON*.. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Braxton v. United States, 500 U.S. 344 (1991) 12

Camps Newfound/Owatonna, Inc. v. Town of Harrison, No. 94-1988 (U.S. Sup. Ct.) 8, 15, 16

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 655 A.2d 876 (Me. 1995) 16

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 11, 13, 14

County of Westchester v. Town of Greenwich, 745 F. Supp. 951 (S.D.N.Y. 1990) 11

Greer v. Spock, 424 U.S. 828 (1976) 11

Hubbard v. United States, ___ U.S. ___, 115 S. Ct. 1754 (1995) 12

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 9

New Energy Co. v. Limbach, 486 U.S. 269 (1988) .. 9, 10, 16

Pilsen Neighbors Community Council v. Netsch, 960 F.2d 676 (7th Cir. 1992) 13

Smith v. Department of Agric., 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981) 13, 14

United Black Community Fund, Inc. v. City of St. Louis, 800 F.2d 758 (8th Cir. 1986) 13

United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984) 9, 10

TABLE OF AUTHORITIES – Continued

Page

White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) 10

CONSTITUTIONAL PROVISIONS

United States Constitution, Commerce Clause ... *passim*

FEDERAL RULES

Sup. Ct. R. 10 8

STATE STATUTES

Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711 ..... 2, 3, 4

Minn. Stat. ch. 309 (1994 & Supp. 1995) 4

Minn. Stat. § 309.501, subd. 1 (1992) 1

Minn. Stat. § 309.501, subd. 1(b)(4) (1994 & Supp. 1995) 3

Minn. Stat. § 309.501, subd. 1(b)(6) (1994 & Supp. 1995) 3

Minn. Stat. § 309.501, subd. 1(b)(8) (1994 & Supp. 1995) 3

Minn. Stat. § 309.501, subd. 1(e) (1994) 1

Minn. Stat. ch. 317A (1994 & Supp. 1995) 3, 4

OTHER AUTHORITIES

Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395 (1989) 14, 15

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Eighth Circuit Court of Appeals in this case. That opinion (Pet. App. 4a-23a) is reported at 82 F.3d 791. The opinion of the district court (Pet. App. 25a-31a) was given orally and is unreported.

STATEMENT OF THE CASE

This case concerns the constitutional challenge of Petitioners, four charitable federations, to certain 1993 amendments to Minn. Stat. § 309.501, the statute that governs the Minnesota State Employees Combined Charitable Campaign ("campaign"). This is "the annual state campaign whereby a state employee may designate that the employee's contribution to a registered combined charitable organization may be deducted from the pay of the employee for each pay period." Minn. Stat. § 309.501, subd. 1(e) (1994). The campaign is conducted in the state workplace during working hours.

Registered combined charitable organizations ("RCCOs") are funding federations of affiliated charities. Before the challenged amendments, Minn. Stat. § 309.501, subd. 1 (1992), defined an RCCO as:

> an organization
>
> (1) which is tax exempt under section 501(c)3 of the Internal Revenue Code . . . and to which contributions are deductible under section 170 of the Internal Revenue Code;

(2) which secures funds for distribution to ten or more charitable agencies in a single, annual consolidated effort;

(3) which is governed by a voluntary board of directors which represents the broad interests of the public;

(4) which distributes at least 70 percent of its total campaign income and revenue to the designated agencies it supports and expends no more than 30 percent of its total income and revenue for management and general costs and fund raising costs;

(5) and each designated agency supported by the recipient institution devotes substantially all of its activities directly to providing health, welfare, social, or other human services to individuals;

(6) and each designated agency supported by the recipient institution provides health, welfare, social, or other human services, in the community and surrounding area in which the recipient institution's fund drive takes place; and

(7) which has been registered with the commissioner of commerce in accordance with this section.

Petitioners met this definition of RCCOs and participated in the 1992-93 campaign.

During the 1993 session, the Minnesota legislature amended the statutory definition of RCCOs, providing more restrictive criteria for participation in the campaign. Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711,

766-69. Three of the 1993 amendments are challenged by Petitioners.

First, the legislature created a new requirement that RCCOs have local boards of directors. Section 309.501 was amended to require participating RCCOs to be governed by a "local, independent" board of directors, ninety percent of whom "live or work in the community or surrounding area." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767, codified as Minn. Stat. § 309.501, subd. 1(b)(4) (1994 & Supp. 1995). Petitioners did not have local boards of directors and thus did not qualify as RCCOs under the 1993 amendments.

Second, the legislature changed the statute to require that seventy percent of the income distributed by an RCCO to its affiliated agencies go to affiliated agencies "that are incorporated in Minnesota or headquartered in the service area in which the [campaign] takes place." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767, codified as Minn. Stat. § 309.501, subd. 1(b)(6) (1994 & Supp. 1995). Petitioners did not qualify under this amendment.

Third, the legislature created more stringent local involvement requirements for the affiliated agencies of an RCCO. Specifically, the legislature required each affiliated agency of an RCCO to provide "all or substantially all of its" services (as opposed to some of its services) "in the community and surrounding area in which the [campaign] takes place." Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 767, codified as Minn. Stat. § 309.501, subd. 1(b)(8) (1994 & Supp. 1995). Petitioners Earth Share and Local Independent Charities, Inc., met

this requirement but Petitioner Independent Charities of America, Inc., did not. It is not clear from the record whether Petitioner National United Service Agencies, Inc., met this requirement.

The legislature also provided a compliance waiver of one year for those RCCOs that participated in the 1992-93 campaign but would be ineligible under the amended criteria for participation in the 1993-94 campaign. Act of May 14, 1993, ch. 192, § 86, 1993 Minn. Laws 711, 770. Consequently, each of the Petitioners participated in the 1993-94 campaign.

The purposes of these 1993 amendments were to simplify the campaign, make it operate more smoothly, and reduce disruption in the state workplace. Pet. App. 13a-14a. They impose no restrictions on the rights of Petitioners or other charitable federations to solicit donations from state employees outside the workplace or to participate in other employers' fund drives. Nor do they otherwise place any restrictions on Petitioners' general ability to solicit donations in Minnesota. *Id.* at 14a. The regulation of charitable fundraising in the state is accomplished by other statutes. *Id.* at 21a; *see generally* Minn. Stat. ch. 309 (1994 & Supp. 1995) (Social and Charitable Organizations), ch. 317A (1994 & Supp. 1995) (Nonprofit Corporations).

On June 2, 1994, Petitioners commenced this lawsuit challenging the constitutionality of these 1993 amendments and certain 1994 amendments to section 309.501. Their amended complaint alleged that the challenged amendments violate the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth

Amendment, and the dormant Commerce Clause. Petitioners sought a declaratory judgment and permanent injunction against application of the statutory amendments.

Petitioners moved for a preliminary injunction to prohibit the 1994-95 campaign from going forward without their participation. In a report and recommendation filed August 1, 1994, the magistrate judge concluded that Petitioners were unlikely to succeed on the merits of any of their claims and recommended the motion be denied. The district court adopted the report and recommendation and denied Petitioners' motion for a preliminary injunction.

The parties agreed there were no genuine issues of material fact, only questions of law, and filed cross-motions for summary judgment. The district court heard the motions on December 16, 1994 and granted summary judgment against Petitioners on each of their claims.

As to the dormant Commerce Clause claim, the district court concluded it was foreclosed by the market-participant doctrine because "the state is acting as an employer and not as a regulator by defining the charitable organizations which have access to its workplace and its employees for the purpose of their fund raising." Pet. App. 31a. The district court described this as "a classic employer function." *Id.*

On April 29, 1996, the Eighth Circuit Court of Appeals affirmed the district court in a unanimous

opinion as to each of Petitioners' claims.[1] The court held that under the market-participant doctrine, the challenged 1993 amendments are not subject to dormant Commerce Clause scrutiny. The court began by recognizing that the dormant Commerce Clause is directed at state regulatory measures, not state proprietary activities. Pet. App. 17a-18a. The court then reasoned that:

> [T]he State is not acting as a market regulator but rather, as an employer, by limiting access to its workplace for the purpose of fund raising. . . . Although the State is participating in the charitable fund raising market, it is doing so as a proprietor allowing its employees to make charitable contributions in the workplace. As such, the State may exercise discretion as to the charities permitted to solicit from state employees during working hours, in the same way that any private employer may limit the parties who conduct business with employees during the work day. Therefore, we reject [Petitioners'] argument that the market participant exception does not apply to local and state governments acting as employers.

Id. at 19a-20a. In view of the principles guiding the doctrine, the court likewise saw "no well-founded reason to constrict the proprietary activities covered by the market

---

[1] The court held first that the challenged 1993 and 1994 amendments to section 309.501 do not violate the First Amendment, equal protection or substantive due process because the restrictions on access to the state workplace for charitable fundraising are clearly reasonable. Pet. App. 13a-16a. Petitioners are no longer pursuing these claims.

participant exception to acts of buying or selling." *Id.* at 20a.

The court also rejected Petitioners' additional argument that dormant Commerce Clause scrutiny is nevertheless warranted because the state is regulating "downstream" in the charitable distribution market by requiring that the member charities of each RCCO provide all or substantially all of their services in the state. Pet. App. 21a-22a. The court held that "[b]y establishing this requirement, the State is not performing a function separate from its role of an employer in restricting the charities which may solicit from State employees" in the state workplace during business hours. *Id.* at 22a.[2]

On June 11, 1996, the Eighth Circuit denied a petition for rehearing and suggestion for rehearing en banc. That petition, like the present petition for certiorari, was limited to Petitioners' contention that the market-participant doctrine cannot exempt a state from dormant Commerce Clause scrutiny unless the state is acting as a buyer or seller.

---

[2] Petitioners have apparently abandoned this "downstream" regulation claim, as the petition is limited to their threshold contention that the market-participant doctrine cannot apply here because the state is not a buyer or seller.

REASONS FOR DENYING THE PETITION

There is no sound reason for the Court to grant review in this case, let alone the requisite "compelling reasons." Sup. Ct. R. 10. The decision of the court of appeals is consistent with the principles guiding the relevant decisions of this Court and is not in conflict with any decision of another court of appeals. Nor is there any ground for delaying a determination on the petition pending this Court's disposition of *Camps Newfound/ Owatonna, Inc. v. Town of Harrison,* No. 94-1988, since that case presents a different Commerce Clause question.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE GUIDING PRINCIPLES OF THE MARKET-PARTICIPANT DOCTRINE IDENTIFIED IN THIS COURT'S DECISIONS.

Petitioners contend that review should be granted in this case on the ground that the Eighth Circuit's decision conflicts with this Court's cases on the market-participant doctrine. Because those cases have applied the doctrine only in factual contexts where the state was buying or selling something, Petitioners view them as implicitly requiring that the doctrine cannot apply unless the state is a buyer or seller, with a concomitant presence of state funding. Petitioners' position mistakenly elevates the particular factual circumstances of the Court's precedents to a constitutional rule. In so doing, it ignores the guiding principles of the market-participant doctrine identified by this Court, which teach that the dormant Commerce Clause applies only to state governmental actions regulating interstate commerce and not to state proprietary

actions analogous to those of private parties. The Eighth Circuit correctly rejected Petitioners' position in concluding that these principles are equally in force when the state acts in its proprietary capacity as employer to limit access to its workplace as when it acts in that capacity to buy or sell goods and services.

As the Eighth Circuit recognized, the starting point of this Court's precedents is the principle that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis in original); *see also United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984) ("The Commerce Clause acts as an implied restraint upon state regulatory powers."). From this it follows that the market-participant exemption exists because the dormant Commerce Clause only withholds from the states the power to regulate interstate commerce and therefore does not reach other state actions even if they may affect interstate commerce. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803-10 (1976). Thus, the relevant inquiry is not whether the state is buying or selling something, but whether it is acting as a governmental regulator of the market.

The Eighth Circuit also correctly recognized, and Petitioners do not dispute, Pet. at 14-15, that the state is not a market regulator subject to dormant Commerce Clause scrutiny when it engages in proprietary activity. As this Court reiterated in its unanimous opinion in *New Energy*, which held the market-participant doctrine

inapplicable to a tax credit scheme, state proprietary activity that is analogous to that of a private actor is not regulatory and therefore is exempt from dormant Commerce Clause scrutiny under the doctrine. 486 U.S. at 277-78. Only when the state is "acting in it distinctive governmental capacity" is it subject to the restrictions of the dormant Commerce Clause. *Id.* at 277.

This principle encompasses the state's actions in its proprietary capacity as employer, as is evident from *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). There the Court held dormant Commerce Clause scrutiny did not apply to a city rule requiring that at least half the work force of each firm performing city-funded construction be city residents. *Id.* at 205-11; *see also United Bldg.*, 465 U.S. at 219 (emphasizing that the crucial element underlying the *White* decision was the fact that the affected employees were "working for the city").

However, Petitioners wrongly posit that, even when the state acts in its role as an employer rather than as government regulator, it is subject to dormant Commerce Clause scrutiny unless it fits the buyer/seller mold – in this instance as a buyer of labor. If the dormant Commerce Clause does not restrict the hiring practices of the state as employer, there is no principled basis for concluding otherwise when the state is limiting access to its employees at the workplace during business hours.

No court has overtly embraced the buyer/seller straightjacket that Petitioners would impose on the market-participant doctrine. Nor should the doctrine be construed so narrowly simply by virtue of the fact that courts

have had occasion to address the doctrine primarily in the context of a state buying or selling goods and services. That there have not been more occasions for courts to address the doctrine in contexts such as that presented here merely reflects the novelty and weakness of claims that the dormant Commerce Clause restricts state proprietary activities on state property. *See, e.g., County of Westchester v. Town of Greenwich*, 745 F. Supp. 951, 955 (S.D.N.Y. 1990) (summarily rejecting claim that dormant Commerce Clause restrictions applied to government "growing trees on its property" because the purported interference with commerce was "caused by property owners acting in a proprietary fashion").

In view of these guiding principles, the Eighth Circuit's dormant Commerce Clause holding in this case is clearly consistent with this Court's decisions. The state workplace, "like any place of employment, exists to accomplish the business of the employer." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 805 (1985). Given this function, the state necessarily has wide discretion in maintaining control over access to its workplace, in the same way private employers do with respect to private workplaces. *Id.* at 805-06; *see also id.* at 800 (stressing that government, "'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated'") (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)). The exercise of this discretion is no more the state acting in its distinctive governmental capacity than is the state's hiring of employees or its purchase or sale of goods and services. It is every bit as much proprietary as the state's hiring, buying or selling activities. Thus, there

is simply no good reason, certainly none put forward by Petitioners, why the state should somehow be considered a market regulator subject to dormant Commerce Clause scrutiny when it acts no differently than a private employer by controlling access to its workplace for charitable fundraising, any more than when the state acts in its proprietary capacity to hire, buy or sell.

In sum, Petitioners have given this Court no sound reason for granting review of the Eighth Circuit's decision on the basis of a conflict with this Court's decisions on the market-participant doctrine.

II. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *SMITH V. DEPARTMENT OF AGRICULTURE* OR ANY OTHER DECISION OF ANOTHER COURT OF APPEALS.

A "principal purpose" for which this Court uses its certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). "The negative implication of this ground, borne out time and again in [this Court's] decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of [this Court's] precedents – even one deemed to be arguably inconsistent with it – will not be reviewed unless it conflicts with a decision of another court of appeals." *Hubbard v. United States*, ___ U.S. ___, ___, 115 S. Ct. 1754, 1767 (1995) (Rehnquist, C.J., joined by O'Connor and Souter, JJ., dissenting on other grounds). Because no such conflict exists here, the Court should deny review.

Respondents have not found any decision of another court of appeals holding or even suggesting that the proprietary activities of a state acting as an employer, in the same way any private employer could, are not exempt from dormant Commerce Clause scrutiny. Indeed, with respect to viewpoint-neutral restrictions on access to the government workplace for charitable fundraising, prior federal court decisions have, like the Eighth Circuit's here, uniformly rejected challenges made on other constitutional grounds. *See Cornelius*, 473 U.S. 788 (rejecting First Amendment challenge to such restrictions on access to federal government workplace); *Pilsen Neighbors Community Council v. Netsch*, 960 F.2d 676 (7th Cir. 1992) (rejecting First Amendment and equal protection challenges to such restrictions on access to state government workplace); *United Black Community Fund, Inc. v. City of St. Louis*, 800 F.2d 758 (8th Cir. 1986) (rejecting First Amendment challenge to such restrictions on access to city government workplace).

Petitioners argue that there is one conflicting court of appeals Commerce Clause decision, *Smith v. Department of Agric.*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). The majority opinion in that case held that a farmers produce market established by Georgia on property it owned and operated was not covered by the market-participant doctrine and, consequently, the restrictions of the dormant Commerce Clause applied to the Georgia Department of Agriculture's regulations on access to the produce market. *Id.* at 1082-83. That decision does not present a conflict that warrants this Court's review.

The *Smith* majority opinion does not conflict with the Eighth Circuit's decision for the simple reason that Minnesota has not created a new market for charitable fundraising as Georgia did for produce. The state workplace was not established for the purpose of charitable fundraising. Rather, the state workplace, "like any place of employment, exists to accomplish the business of the employer." *Cornelius*, 473 U.S. at 805. By allowing its employees to make charitable contributions in the workplace during business hours, and limiting access to the workplace for this purpose, the state as employer does not thereby create a new market for charitable fundraising. It is simply acting toward its employees in the same proprietary capacity that private employers do toward their employees.

Nor is the state workplace even remotely analogous to certain types of government property, such as highways, which are constructed specifically to serve as an artery of commerce. *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 450-51 (1989) (discussing road-use cases). Indeed, Petitioners themselves recognize that the most sensible explanation for the result in *Smith* is that the produce market was created for the very purpose of serving as an artery of commerce, and therefore limiting access to it was akin to limiting access to state roads. Pet. at 12. Limiting access to the infrastructure of interstate trade is hardly comparable to limiting the access of fundraisers to government employees in their workplace during business hours.

Finally, the reasoning of the *Smith* majority opinion has been criticized as aberrational. *See Smith*, 630 F.2d at

1086-88 (Randall, J., dissenting); Coenen, *supra*, at 451 & n.334. The case has hardly been viewed as vibrant authority given that it has never been cited by any court of appeals, including the Fifth and Eleventh Circuits themselves, and has not been cited in any reported federal or state court decision since 1987, notwithstanding the numerous market-participant doctrine cases decided during this time. Accordingly, even if the decisions were viewed as inconsistent in some measure, there is no need for this Court to grant review to reconcile those differences.

In short, Petitioners have not identified any decision of another court of appeals that stands in conflict with the Eighth Circuit's holding that a state is not subject to dormant Commerce Clause scrutiny when it acts as an employer to limit access to its workplace for charitable fundraising in the same way any private employer could.

III. A DETERMINATION ON THE PETITION SHOULD NOT BE DELAYED TO AWAIT THIS COURT'S DECISION IN *CAMPS NEWFOUND/ OWATONNA, INC. V. TOWN OF HARRISON.*

The Court should decline Petitioners' request to delay action on their petition until after it decides *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, No. 94-1988, which was argued on October 9, 1996. This request is based on Petitioners' unfounded prediction that in deciding *Camps Newfound*, the Court could effectively establish state funding as an absolute requirement of the market-participant doctrine, and thereby preclude its application here. Pet. at 7, 16.

The question accepted for review in *Camps Newfound* is whether a Maine tax statute violates the Commerce Clause because it deprives charitable nonprofit institutions of otherwise available property tax exemptions if they are conducted or operated principally for the benefit of non-residents. Petitioner's Brief, No. 94-1988 (statement of question presented). The state court decision being reviewed makes no mention of the market-participant doctrine, *see* 655 A.2d 876 (Me. 1995), and the briefs to this Court address the doctrine only by analogy and in a secondary and cursory fashion, *see* Respondent's Brief at 34-37; Petitioner's Reply Brief at 14-15.

Thus, the question on review in *Camps Newfound* has no connection to the question presented here other than in the general sense that both arise under the dormant Commerce Clause. Unlike here, the state action at issue in *Camps Newfound* is distinctively governmental, not proprietary. This is made clear by *New Energy*, in which this Court held unanimously that the market-participant doctrine had no application to a state's "assessment and computation of taxes" because that is "a primeval governmental activity," not a proprietary activity analogous to the actions of a private actor. 486 U.S. at 277-78. It is highly unlikely then that in deciding *Camps Newfound* the Court will address application of the market-participant doctrine to state proprietary activity, let alone determine whether its application to that activity is contingent on state funding, as Petitioners suggest.

Accordingly, there is no reason to delay determination on the petition because the disposition of *Camps Newfound* cannot be expected to place the Eighth Circuit in conflict with this Court on the question whether a state

is exempt from dormant Commerce Clause scrutiny when it acts in its proprietary capacity as an employer to limit access to its workplace for charitable fundraising.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

JOHN S. GARRY
Assistant Attorney General

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2128
(612) 282-5712

Counsel For Respondents

Dated: October 17, 1996